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No. 88-82

In the Supreme Court of the United States

OCTOBER TERM, 1988

STARRETT CITY ASSOCIATES, *et al.*,
Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STARRETT CITY TENANTS ASSOCIATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the race-conscious rental practices used to achieve and maintain integration at Starrett City violate the Fair Housing Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
REASONS FOR GRANTING THE PETITION	2
A. Review Is Needed Because the Integration Goals of the Fair Housing Act Cannot Be Achieved Without the Consideration of Race	3
B. This Case Is Well-suited for Review in This Court, Because the Legal Issue Is Squarely And Openly Presented	7
C. The Potential Effect of the Court of Appeals' Decision on Starrett City Itself Is Sufficiently Significant to Warrant This Court's Attention	8
D. Review Is Warranted Because Successful Integration Like That at Starrett City Will Encourage the Construction of Additional Needed Subsidized Housing	14
CONCLUSION	15
APPENDIX	1a

TABLE OF AUTHORITIES

Cases: Page

Arthur v. *Starrett City Associates*, 79 Civ. 3096 (E.D.N.Y. filed Dec. 5, 1979) 7
Fullilove v. *Klutznick*, 448 U.S. 448 (1980) 3, 9
Local 28 of the Sheet Metal Workers Int'l Assoc. v. *EEOC*, 478 U.S. 421 (1986) 3
Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978) 3
Trafficante v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) 3
United States v. *Paradise*, 107 S. Ct. 1053 (1987) 3
United States v. *Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988) 12
United Steelworkers v. *Weber*, 443 U.S. 193 (1979) 3

Statutes:

Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3613 (the Fair Housing Act) ..... *passim*

Other Authorities:

114 Cong. Rec. 3134 (1968) 3
114 Cong. Rec. 3422 (1968) 3
K. Taeuber, *Racial Residential Segregation, 28 Cities, 1970-1980*, Center for Demography and Ecology, University of Wisconsin-Madison (1983) 3, 4
D. Massey and N. Denton, *Trends In The Residential Segregation Of Blacks, Hispanics, And Asians: 1970-1980*, 52 Amer. Soc. Rev. 802 (Dec. 1987) 4, 5

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INTEREST OF THE *AMICI CURIAE*

The Starrett City Tenants Association is the principal organization representing the thousands of persons who actually live at Starrett City. The other *amici*, listed in the Appendix, are 29 other civic, religious, charitable, and social groups that operate in or near Starrett City and that include many Starrett City residents among their members.

Members of the Starrett City Tenants Association and the other *amicus* groups have an obvious and direct in-

terest in the rental practices employed at Starrett City. Those practices have enabled Starrett City to become and remain a healthy, integrated community. They have encouraged persons of diverse racial, ethnic, and religious backgrounds to live together and to take pride in their homes.

Starrett City's residents want to preserve the integrated character of their community. Many choose to live at Starrett City at least in part because of the development's commitment to integration. Now, the successful 15-year experiment at the nation's largest federally assisted housing development is in jeopardy. The government and the courts below threaten to transform Starrett City from an exemplary integrated community to a racially segregated housing project. The residents of Starrett City urge this Court to intervene before that happens.

Amici and their members know firsthand both the tangible and the intangible benefits of integrated housing. They can testify from experience that the goal of integration, to which Congress committed this nation in the Fair Housing Act, is a goal well worth pursuing. *Amici* ask this Court, therefore, to grant review in this case and to prevent the Fair Housing Act from being used to produce a result diametrically opposite from that which Congress hoped to achieve.[1]

REASONS FOR GRANTING THE PETITION

Review is warranted in this case because the question presented is extremely important. Whether a housing development, operating under state and federal supervision, may consider race in the renting of its apartments when necessary to achieve and maintain integration is an issue of obvious nationwide significance. On

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[1] The parties' letters of consent for the filing of this brief have been submitted to the Clerk of the Court.

several previous occasions, this Court has addressed the legality of race-conscious measures used to achieve certain social ends. *See, e.g., Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (race-conscious medical school admissions); *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979) (race-conscious collective bargaining agreement); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) (race-conscious distribution of public works funds); *Local 28 of the Sheet Metal Workers Int'l Assoc.* v. *EEOC*, 478 U.S. 421 (1986) (race-conscious admission to union membership); *United States* v. *Paradise*, 107 S. Ct. 1053 (1987) (race-conscious job promotion practices). The permissibility of race-conscious rental practices needed for the creation and preservation of integrated housing is surely no less important.

A. Review Is Needed Because the Integration Goals of the Fair Housing Act Cannot Be Achieved Without the Consideration of Race.

Congress enacted the Fair Housing Act in 1968 for the express purpose of replacing segregated housing with "truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968), quoted in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972). The Act was intended "to attack the segregated neighborhood" and to show that "once and for all we have decided, as a nation, to live together, not separately." 114 Cong. Rec. 3134, 3422 (1968) (remarks of Sen. Mondale).

Notwithstanding the clear congressional purpose, progress toward the goal of integrated housing has been agonizingly slow. That fact should be readily apparent to anyone who drives through the residential neighborhoods of our nation's major cities. One need not rely entirely on such impressionistic evidence, however.

In his 1983 study, *Racial Residential Segregation, 28 Cities, 1970-1980* (Center for Demography and Ecology, University of Wisconsin-Madison), Prof. Karl Taeuber used 1980 census data—data collected 12 years after

enactment of the Fair Housing Act—to examine all 28 U.S. cities having a black population of 100,000 or more. Together, these cities housed nearly 10 million blacks, approximately one-third of the total U.S. black population. Taeuber measured the levels of housing integration in these cities on the basis of an index in which 100 represents total segregation (that is, every city block is either 100% or 0% black), and 0 represents total integration (that is, every city block has the same ratio of blacks in it as the city as a whole).

Prof. Taeuber found that the nation's 1980 segregation index was 81, down only 6 points from 1970. This decline of 6 points during the 1970's was identical to the decline in the previous decade. The Fair Housing Act did not produce any apparent acceleration of the pace of integration. If the same rate of change continues, Prof. Taeuber concluded, it will take 50 years just to achieve an index of 50, that is, to produce a situation in which 50% of city blocks have blacks living in them in the same proportion as the proportion of blacks in the city as a whole. Taeuber at 4-5; *see also* Pet. App. K-72 and K-73 (affidavit of Oscar Newman, discussing the Taeuber study).

A more recent study has confirmed Taeuber's findings. Based on detailed analyses of 1970 and 1980 census data for 60 standard Metropolitan Statistical Areas, including the 50 largest such areas in the United States, Professor Douglas S. Massey of the University of Chicago and Nancy A. Denton of the Population Research Center at the same school have concluded that, "despite recent declines in some metropolitan areas, the level of black segregation remains quite high, especially in cities where the majority of urban blacks live." *Trends in the Residential Segregation of Blacks, Hispanics, and Asians: 1970-1980*, 52 Amer. Soc. Rev. 802, 817 (Dec. 1987). Indeed, Massey and Denton report, "there has been remarkably little change in the status quo since 1970." *Id.* at 823. The discouraging fact is that during the 1970's, "[d]espite the ad-

vent of fair housing legislation, more tolerant white racial attitudes, and a growing black middle class with income sufficient to promote residental mobility, the segregation of blacks in large cities hardly changed." *Ibid.*

Starrett City itself is but an example—a large and dramatic example, to be sure, but still just an example—of the pervasive problems encountered in the effort to implement our national commitment to integrated housing. There is no question that, if Starrett City had rented its apartments on a first-come, first-served basis, the development would have been a segregated minority development from the outset. That fact has never been contested. The development was built on the southern edge of the depressed, overwhelmingly minority neighborhood of East New York, in Brooklyn. When construction of the residential buildings began in 1972, approximately 50 prospective tenants per day visited an information center set up in a trailer at the northern end of the construction site. Ninety-nine percent of the several thousand people who visited the site in 1972 were from East New York and were black. When Starrett City was built, therefore, there were three, and only three, alternatives available to petitioners and the state and federal governments:

1. They could allow the development to become virtually all black;
2. They could consider race as a factor in the rental of apartments and produce an integrated tenant population; or
3. They could abandon plans to build subsidized housing at the Starrett City site.

Recognition of this reality is what led the New York State Division of Housing and Community Renewal and the federal Department of Housing and Urban Development, both of which have supervised Starrett City's ren-

tal practices from the outset, to join with Starrett City in adopting and implementing the very measures that the government now challenges. *See* Pet. App. K-3. If the integration goals of the Fair Housing Act were to be served, there was simply no alternative but to take race into account in the rental of Starrett City's apartments.

That remains true today, at Starrett City and in many other locations as well. Successful integration of subsidized housing requires active intervention by management, working in conjunction with federal, state, and local housing officials. It will not happen by accident. This proposition is amply supported by the extensive evidence marshalled by Starrett City in support of its cross-motion for summary judgment. *See, e.g.*, Pet. App. K-23 to K-29, K-75 to K-76, K-81 to K-83. As Judge Newman wrote in dissent in the court of appeals (Pet. App. A-27), that evidence "may well be sufficient to entitle [Starrett City] to summary judgment on this issue of continued need for a race-conscious rental policy to maintain integration."

In any event, for present purposes, Starrett City's point must be taken as given. The government has chosen to litigate this case on the assumption that a race-conscious rental policy *is in fact needed* to maintain integration at Starrett City. In the government's view, that does not matter. The government has sought and obtained summary judgment, claiming it is entitled to prevail regardless of the consequences at Starrett City and for integrated housing generally. The government's position is simply that race may not be considered for any reason, even if some consideration of race is needed to achieve the integration sought by the Fair Housing Act. In the government's view, the bare language of the Act must prevail over its unquestioned purpose. Review by this Court is needed to determine whether the integration goals of the Act must be sacrificed to an excessively literal reading of its language.

B. This Case Is Well-suited for Review in This Court, Because the Legal Issue Is Squarely And Openly Presented.

Starrett City has always been forthright about its commitment to integration. Far from denying its rental practices, Starrett City has acknowledged them openly. Starrett City has advertised itself as a model of integrated living, and it has candidly admitted its consideration of race as a factor in the rental of apartments. The district court record contains the following Request for Admission by the government and Response by petitioners (A00086):[2]

> *Request for Admission No. 54*
>
> The defendants, to further and maintain racial integration at Starrett City, openly control tenant selection on the basis of race.
>
> *Response*
>
> Starrett admits the matter stated in this request.

Although Starrett City's candor has made it an inviting target for litigation (both in the present case and in the private class action captioned *Arthur* v. *Starrett City Associates*, 79 Civ. 3096 (E.D.N.Y. filed Dec. 5, 1979)), the absence of any significant factual dispute about what Starrett City does in renting its apartments makes this a particularly suitable case for review. The issue presented in this case need not and should not be permitted to "percolate" any longer in the lower federal courts.

If the court of appeals' decision is permitted to stand, the few housing managers and housing officials who have been willing openly to advocate integration through the use of race-conscious rental practices may be forced

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[2] "A" refers to the joint appendix filed by the parties in the court of appeals.

either to abandon their integration efforts or to emulate those other housing professionals who have undertaken similar measures surreptitiously. The lingering uncertainty that will surround the proper construction of the Fair Housing Act if this Court denies review here may well adversely affect important housing decisions, while the lower federal courts grapple with the detailed factual disputes likely to be raised in future litigation of this kind. The negative consequences of delaying this Court's intervention will far outweigh any conceivable benefit that may be derived from one or two more appellate opinions on the subject prior to review in this Court.

C. The Potential Effect of the Court of Appeals' Decision on Starrett City Itself Is Sufficiently Significant to Warrant This Court's Attention.

The residents of Starrett City are, of course, principally concerned with the effect of the court of appeals' decision on the development that they call their home. The people who live there do not wish to idealize Starrett City; like any place else, it is not perfect. But Starrett City has been and remains a good place to live, a place where low-to-moderate income families can find decent and affordable housing with good schools and a low crime rate. In large measure, *amici* submit, the virtues of Starrett City as a place to live are attributable to its integrated character. That is why *amici* are so concerned by the decision below.

It is worth stressing, because the court of appeals' decision barely takes note of the fact, that integration at Starrett City is no mere token. As of March 31, 1986, 63% of Starrett City's apartments were rented to whites, 22% were rented to blacks, 8% were rented to Hispanics, and 5% were rented to orientals (Pet. App. K-23). Moreover, according to the 1980 census, the racial composition of Starrett City by population was approximately

55% white and 45% minority. The population figures reflected in the 1980 census remain approximately accurate today, except that the percentage of minority tenants has probably increased slightly due to a small increase in the percentage of Starrett City units occupied by blacks (Pet. App. K-23 to K-24). Not only do minorities constitute a very substantial percentage of Starrett City's population, but the current racial mix at Starrett City very closely approximates the racial mix in Starrett City's market area, the area from which Starrett City draws most of its tenants (Pet. App. K-98 to K-99).

All of these facts are undisputed. All of them were included in petitioners' Statement of Undisputed Material Facts in the district court (A00347), and none of them was challenged by the government. Likewise uncontested is the fundamental fact that Starrett City's rental practices "have been adopted solely to achieve and maintain integration and are not motivated by any racial animus" (A00347-8; Pet. App. K-3 to K-4). Starrett City has never sought to limit minorities to some trivial number of apartments in an enormous housing development. Rather, minority residents are today, and have been from the very beginning of the rental process at Starrett City, a major part of the development's population.

Moreover, Starrett City's rental practices do not *exclude* anyone. Unlike other race-conscious measures that apportion scarce goods, such as the race-conscious distribution of public funds sustained in *Fullilove*, Starrett City's efforts to preserve integration do not restrict eligibility for benefits at all. No one is denied an apartment at Starrett City based on race. The average time on the waiting list is longer for minority applicants, but any qualified applicant, regardless of race, is fully eligible to apply for and obtain any apartment at the development.

The substantial minority participation at Starrett City over a period of nearly 15 years accounts for the consid-

erable *amicus* support that petitioners have attracted in this litigation. Starrett City's petition for rehearing in the court of appeals was supported not only by the Starrett City Tenants Association and the other *amici* filing this brief, but also by three members of Congress from New York, four members of the New York State legislature, the Borough Presidents of Brooklyn and the Bronx, the NAACP New York State Conference, the State Human Rights Advisory Council, National Neighbors, and other individuals and groups favoring integrated housing.

Integration at Starrett City is not only an essential part of the development's character, but it is a major reason for the development's attractiveness to prospective tenants. One of the sad ironies of the government's position in this litigation is that is seeks to destroy the very feature of Starrett City that has created the substantial demand that now exists for apartments there. The government purports to be assisting minority applicants on the Starrett City waiting list. But those applicants have brought and settled their own lawsuit, without assistance from the government. They have agreed that Starrett City's rental practices should be left unchanged. If the government prevails in this case and the lower court's decision is allowed to stand, it may well be that the waiting list for which the government expresses such solicitude will dwindle and eventually disappear. For once Starrett City has become a segregated minority project—a result that all agree is inevitable under the court of appeals' ruling—Starrett City will no longer be the attraction it is today for potential residents, black or white.

Although the courts below have ignored the point, the available evidence shows a dramatic contrast between the social characteristics and "quality of life" at Starrett City and at other comparable developments that have

experienced rapid transitions to segregated minority developments. The precise causal explanation for these differences can be left to the sociologists, urban planners, economists, and politicians. The salient fact as far as the people who live at Starrett City are concerned is that comparable housing developments have become far less desirable places to live, in tangible as well as intangible ways, following a change to segregated minority status.

In the words of Dr. Kenneth Clark, one of the expert witnesses who submitted an affidavit in support of Starrett City in the district court, "[p]ast experience with integrated communities that have become segregated minority communities shows that such transformations are often accompanied or followed by a noticeable deterioration in the quality of life, as measured by any of several criteria" (Pet. App. K-61). After conducting a detailed study of attitudes among black residents of Starrett City, Dr. Clark reported that "a great preponderance of blacks at Starrett City strongly desire residential integration" (Pet. App. K-57). He explained that the observed decline of housing developments that have experienced a rapid transition from integration to segregation is attributable to the attitudes of black as well as white residents. In Dr. Clark's words (Pet. App. K-61 to K-62),

> [u]pwardly mobile blacks know the value of an integrated neighborhood and tend to seek housing elsewhere when a neighborhood goes through racial transition. The result is racial and economic ghettoization; for the resegregated communities consist primarily of less educated, lower income blacks, who have a greater propensity for social instability. This is often reflected by increased violence and higher crime.

Dr. Clark concluded that "segregated residential communities can never be the true equal of integrated communities and can never provide the benefits to be derived

from a community in which persons of different racial and ethnic backgrounds live together in harmony and cooperation" (Pet. App. K-62).

Detailed evidence supporting Dr. Clark's views can be found in the affidavit of Oscar Newman, another of Starrett City's expert witnesses in the district court, and now the district court's own expert in the implementation of the desegregation orders recently upheld in *United States* v. *Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988). *See* Pet. App. K-76 to K-77, K-87 to K-98. Newman examined four public housing projects near Starrett City; two developments of comparable size to Starrett City but located in Queens, approximately five miles from Starrett City; one higher-income private apartment development across the street from Starrett City; and one higher-income rental development of approximately 1,500 units located a little more than a mile from Starrett City, on the Brooklyn-Queens border. As Newman has documented, although the details vary to some extent from development to development, all of these developments underwent sharp racial transformations in the 1970's. All are now overwhelmingly minority.

Newman investigated a variety of specific subjects, including (i) crime; (ii) "skips" and evictions;[3] (iii) school performance; and (iv) physical conditions. Although differences in the available data precluded Newman from making every comparison with every housing development, the overall result of his inquiry was clear. The picture at Starrett City is more favorable than that at the other developments, under virtually every criterion considered.

Some of the data gathered by Newman on comparative school performance are particularly striking. These data, which are reproduced in the Newman affidavit (Pet. App.

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[3] To "skip" means to move out of an apartment without paying rent already due.

K-92 to K-94), involve not a comparison with another particular housing development but rather a comparison between the public elementary school at Starrett City and the nearest neighboring school. The data show that black students at Public School 346, the elementary school at Starrett City (26.8% black, 22.4% Hispanic, 39.9% white, and 10.9% other), have performed substantially better than black students at Public School 306, a socio-economically similar but virtually all-minority elementary school a few blocks from Starrett City (81.2% black, 18.2% Hispanic, 0.5% white, and 0.3% other). Both schools are under the supervision of the same community school district. The consistent and substantial differences in achievement demonstrate that it is not just the white and oriental students at Starrett City who are raising the average performance level there but that the black students at Starrett City are also benefiting significantly from the integrated educational environment provided both in the schools and in the development as a whole.

The positive influence of Starrett City has been felt outside, as well as within, the development's borders. Starrett City's presence for more than a decade as a stable anchor on the southern edge of East New York has contributed to—indeed, may well have served as a catalyst for—the neighborhood's revitalization. The area immediately north of Starrett City now contains numerous new businesses, and there are several examples of new or renovated housing replacing abandoned or boarded-up stores and houses. The success of Starrett City has helped to encourage this redevelopment and to arrest the deterioration of East New York (Pet. App. K-2).

For all these reasons, *amici* believe that Starrett City itself is sufficiently important to warrant the Court's attention. The highly dubious legal ruling by the divided panel below should not be permitted, without this Court's

review, to alter irretrievably the character of a model community of some 17,000 residents.

D. Review Is Warranted Because Successful Integration Like That at Starrett City Will Encourage the Construction of Additional Needed Subsidized Housing.

A final reason that this case merits review is that the success of integrated subsidized housing such as Starrett City breeds new opportunity to satisfy the housing needs of persons of low-to-moderate income. As Starrett City's expert witness Oscar Newman has said (Pet. App. K-86), with the success of Starrett City and other similar developments, more sites are likely to become available for integrated housing in adjacent white communities; more housing developers are likely to perceive the advantages and stability of investment in such developments; and more legislators are likely to perceive the utility of housing subsidies as a means of serving their constituents of all races (Pet. App. K-86). And, if an adequate supply of decent, integrated housing were available, there would be no question about our nation's ability to house minority applicants without sacrificing the integrated character of developments like Starrett City.

There is another, more troubling side of the coin. If the common perception of subsidized housing is that such housing inevitably will become segregated minority housing, political support for new publicly assisted housing is likely to be increasingly difficult to marshal. Newman's research suggests that this cause-and-effect relationship has been operative in New York since 1960 (Pet. App. K-85), and the sharp decline in publicly assisted housing starts throughout the nation during the last decade may well be a reflection of the same point.

Before Starrett City's prospects as a model for future integrated subsidized housing developments are discarded, this Court should grant review to determine whether the government's reading of the Fair Housing Act accords with Congress' intent in passing that statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 16, 1988

APPENDIX

In addition to the Starrett City Tenants Association, *amici* include the following organizations:

Hispanic Alliance, Inc. of Starrett City
The Onyx Corporation, Inc.
Youth Federation of Starrett City
Parent Teachers Association of Public School 346
Parent Teachers Association of
Intermediate School 364
Community Board #5
Voters League of Starrett City
Anchor Baptist Church
Christ Community Church
Starrett City Jewish Center
Golda Meir Chapter—B'nai B'rith Women
Jewish Community Council of
Starrett City Organization
Kiwanis Club of Spring Creek
Kiwanis Club of Jamaica Bay, Inc.
Starrett City Spring Creek Lions Club
Starrett City Boxing Club
Cancer Care, Inc.
United Leukemia Fund of Starrett City, Inc.
United Cerebral Palsy of New York City, Inc.
Deborah Hospital Foundation-Starrett City Chapter
Starrett City Volunteer Ambulance Corp.
Jewish Association for Services for the Aged
Jewish War Veterans Post 150
Starrett City Ladies Auxiliary #150
Girl Scouts of Greater New York—
Starrett City Chapter NB7
The Boy Scouts of America—Troop 121
Italian American Civil Rights League
Canarsie Neighborhood Development Corp., Inc.
Starrett City Landfill Committee